STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JERRY C. RILEY,

Defendant-Appellant.

UNPUBLISHED
November 27, 2001

No. 222117
Wayne Circuit Court
Criminal Division
LC No. 98-007876

Before: Zahra, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of armed robbery, MCL 750.529, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of nine to twenty years for the armed robbery conviction, two to four years for the felonious assault conviction, and a consecutive two-year term for the felony firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in allowing a police officer to testify that while awaiting his arraignment in district court, defendant stated that he smoked Black and Mild cigars. Defendant claims he should have been advised of his *Miranda*[1] rights before making the remark. Defendant's argument is without merit. *Miranda* warnings were not required because the statement was not made as part of a police interrogation. *Rhode Island v Innis*, 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980); *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987); *People v Kulpinski*, 243 Mich App 8; 620 NW2d 537 (2000). Nor do we find error in the admission of police officer testimony that defendant asked for a Black and Mild cigar when the police stopped at a gas station while transporting defendant. The statement was voluntarily made and simply was not the product of a custodial interrogation. Thus, *Miranda* warnings were not required.

Defendant also argues that the trial court abused its discretion by allowing a Pittsfield Township police officer to testify that he was investigating defendant in a separate matter arising in Washtenaw County and that he recognized defendant after seeing the store video of the armed robbery and shooting and an artist sketch of the suspect in the instant case. Contrary to what

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

defendant argues, there is no indication that the prosecutor offered this evidence under MRE 404(b). Rather, the record supports the conclusion that the prosecutor did not seek to inject evidence of other bad acts by defendant but merely sought to provide support for the police officer's identification of defendant as the person depicted on the store video of the armed robbery. As the trial court noted, in response to defense counsel's objection, "I don't know [why the police officer] was looking for him... [I]t could have been for a traffic ticket." Significantly, any substantive evidence relating to defendant's involvement in a Washtenaw County case was solicited by defense counsel during cross examination of the police officer, not from the prosecutor's direct examination. Simply put, the prosecutor did not solicit evidence of other bad acts. Thus, the trial court did not abuse its discretion in allowing the officer to testify regarding this matter.

Next, defendant argues that defense counsel was ineffective because he failed to move to suppress an eyewitness' identification of defendant. We disagree. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The record clearly demonstrates that trial counsel did move to suppress the eyewitness' identification on the ground that it was the result of an unduly suggestive line-up procedure. The trial court denied the motion after finding that the line-up was not impermissibly suggestive. Thus, we find no merit to this issue. Any motion to suppress eyewitness identification made during trial would have been futile.

We also conclude that the trial court did not err in denying defendant's motion for a new trial on the basis that trial counsel was ineffective for not presenting an alibi defense. Defense counsel made a strategic decision not to pursue an alibi defense. Furthermore, defendant has failed to show that he was prejudiced by any alleged deficiency. Although Jason Dickerson, one of defendant's proposed alibi witnesses, testified at the post-trial hearing that he "remembered" February 20, 1998, he also stated that he could "not really" remember what he did that night. The testimony of defendant's mother was also vague in regard to the specific date in question. Finally, defendant himself incorrectly gave the date of the charged crimes and his alibi as being "January 20, 1998," when the offenses were actually committed on February 20, 1998. Accordingly, we conclude that defense counsel's failure to present an alibi defense did not deprive defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), modified 453 Mich 902 (1996); cf. *People v Bass*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 219934, issued 9/7/01); *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996).

Finally, viewed in a light most favorable to the prosecution, the evidence was sufficient to identify defendant as the perpetrator of the crimes in question beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ William B. Murphy